

Buckeye Electric Co. and International Brotherhood of Electrical Workers, Local 1105. Case 9-CA-39021

June 18, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On July 31, 2002, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions²

¹ Respondent excepts to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent threatened employees with more onerous working conditions because of their union activities in violation of Sec. 8(a)(1) based on the credited testimony of Tim McCoy that Supervisor Scott Whitaker told him Respondent's president, Dick Smythe, was at a jobsite to send McCoy to Dayton in an effort to make McCoy quit. Respondent contends in exceptions that the judge erred in relying solely on hearsay testimony of McCoy and Whitaker about what Richard (Rick) Smythe would allegedly do when a Columbus site worker joined the Union. We disagree. The finding of a violation is based on nonhearsay testimony by McCoy about a threat of more onerous working conditions made directly to him by his supervisor. It is irrelevant whether Smythe actually expressed the intent attributed to him by Whitaker.

² We agree with the judge that the General Counsel met his burden of proving unlawful motivation for McCoy's discharge. Respondent argues in exceptions that the timing between the discharge and open union activity, standing alone, is insufficient proof of animus *in this case*. We note, however, that the judge considered other evidence in conjunction with the factor of timing, including Supervisor Whitaker's threat of more onerous working conditions. With respect to this other evidence, however, we do not rely on noncoercive statements made by Rick and Dick Smythe that McCoy would now be "paying to go to work" and that the "A-team" did not want McCoy anymore. Member Walsh agrees with all elements of the judge's analysis of this aspect of the case.

The judge stated his view that "the Respondent could have lawfully terminated McCoy on September 10 when he announced that he had joined the Union and would be leaving soon." And that "Smythe's initial decision to give McCoy until the end of the week . . . probably posed no violation." Read in context, we interpret the judge's comments to mean that Respondent did not have any legal obligation to retain McCoy for any period of time after he announced he would be leaving, not that Respondent could immediately discharge him because he had joined the Union.

and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Buckeye Electric Co., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a), relettering the subsequent paragraphs:

"(a) Within 14 days from the date of this Order, offer Tim McCoy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

"(b) Make Tim McCoy whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision."

2. Substitute the following for relettered paragraph 2(d):

"(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Revise relettered paragraph 2(e) by substituting the date September 11, 2001, for the date January 23, 2002.

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

³ We shall modify the judge's recommended Order, and substitute a new notice, in accordance with our recent decisions in *Indian Hills Care Center*, 321 NLRB 144, 145 (1966); *Ferguson Electric Co.*, 335 NLRB 142 (2001); and *Excel Container*, 325 NLRB 17 (1997).

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees because of their support of and sympathies for International Brotherhood of Electrical Workers, Local 1105, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against employees because they desire and seek membership or the benefits of membership in International Brotherhood of Electrical Workers, Local 1105, or any other labor organization.

WE WILL NOT threaten employees with more onerous working conditions because of their support of International Brotherhood of Electrical Workers, Local 1105, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Tim McCoy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Tim McCoy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Tim McCoy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BUCKEYE ELECTRIC CO.

Theresa Donnelly-Laite, Esq. and Kathleen Floth, Esq., for the General Counsel.

Stephen M. Pfarrer, Esq., of Dayton, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me on May 30, 2002, in Dayton, Ohio, pursuant to a charge filed on January 23, 2002, against Buckeye Electric Co. (the Respondent) by the International Brotherhood of Electrical Workers, Local 1105 (the Union). On March 7, 2002, the Acting Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening an employee with more onerous working conditions because of his support of the Union, and Section 8(a)(3) and (1) of the Act by discriminatorily discharging said employee because of his support of and membership in the Union. On or about April 2, 2002, the Respondent filed a responsive answer essentially

denying the commission of any unfair labor practices and asserting several affirmative defenses.¹

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,² I make the following

FINDINGS OF FACT

I. JURISDICTION—THE BUSINESS OF THE RESPONDENT

The Respondent, with an office and place of business in Dayton, Ohio, has been engaged as an electrical contractor in the construction industry. During the past 12 months, the Respondent, in conducting its operations, performed services valued in excess of \$50,000 for enterprises within the State of Ohio. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Respondent admits, and I find and conclude, that the International Brotherhood of Electrical Workers, Local 1105, has been a labor organization within the meaning of Section 2(5) of the Act.³

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates as a nonunion electrical contractor in the construction industry. The Respondent's main office is located in Dayton, Ohio, but its operations covered various projects in and around both Dayton and Columbus.

Dick and Richard (Rick) Smythe, father and son, respectively, serve as president and vice president of the Respondent.⁴ Both Smythes had authority to hire, fire, or discipline employees, and each exercised that authority as part of their duties and responsibilities to the Company.

The Respondent's work force is divided between a Dayton crew and a Columbus crew. Employees were in the main assigned to one crew or the other based on the proximity of their residences to the respective a project sites in and around these cities.

¹ In its answer, the Respondent admitted that the charge was filed by the Union on January 23, 2002, as alleged; however, the Respondent denied that a copy of the charges was served on it by regular mail on January 24, 2002. At the hearing, the Respondent stipulated and agreed that a copy of the charges was served on it by regular mail on January 24, 2002.

² The Charging Party Union did not file a brief.

³ In its answer, the Respondent stated it was without information sufficient with which to form a belief as to the truth of the labor organization status of the Union. At the hearing, the Respondent stipulated and agreed that the Union was a labor organization within the meaning of the Act.

⁴ The Respondent admits, and I find and conclude, that the Smythes are supervisors and/or agents within the meaning of Sec. 2(11) and (13) of the Act.

The Respondent's employees at the time of hire are provided a handbook that they are required to read and acknowledge receipt.⁵ The Respondent's handbook sets out various policies and procedures of the Company, including safety, personal behavior, time and attendance, leave vacation, and other benefits. The handbook also states that employment at the Company is "at will" and that an employee can be terminated by either the employee or the Company for any or no reasons and without notice to either party.

Alleged discriminatee Tim McCoy was hired by Rick Smythe on about April 1, 1996, as a journeyman electrician. At the time of hire, McCoy lived in Stockport, Ohio, which is about 100 miles northeast of Columbus. McCoy, when hired, was told by Smythe that he would be working in the Columbus area and, throughout his employment at the Respondent, worked solely at Columbus area project sites.⁶ During the period covering late August 2001 through September 21, 2001, McCoy was employed at the Respondent's Sisson Hall project on the campus of the Ohio State University; McCoy's immediate supervisor at Sisson Hall was Scott Whitaker.⁷ The Sisson Hall project manager was Donald Stafford,⁸ who reported to Rick Smythe.

On about September 7, 2001, while on vacation, McCoy, having completed the Union's application and interview process, joined Local 1105 of the IBEW.

On the morning of September 10, 2001, McCoy returned to work and told Whitaker that he had joined the Union. Later that same day, McCoy also told Stafford and Rick Smythe that he had joined the Union. On September 11, 2001, McCoy informed Dick Smythe that he had joined the Union. On September 20, Rick Smythe advised McCoy that Friday, September 21, 2001, would be McCoy's last day of employment with the Respondent. McCoy reported for work on September 21 but only to return his keys and retrieve personal items and otherwise did not work that day.

The complaint essentially alleges that on or about September 11, 2001, Whitaker threatened McCoy with more onerous working conditions because of his support of the Union; and that McCoy was discriminatorily discharged by the Respondent on September 21, 2001, because he joined and assisted the Union or engaged in union activities.

B. The September 11 Threat Allegations

McCoy testified at the hearing, stating that on September 11, he reported for work that morning and conversed with Dick Smythe at the Sisson Hall site near the electrical closet where he was working. According to McCoy, Smythe, among other matters, asked him if he had joined the Union, to which McCoy

said that he had.⁹ McCoy stated that Whitaker was present during the entire conversation but made no comment. This conversation took place before lunch. McCoy said later that day, around 1 p.m., he was having some problems with a wiring assignment at the site and consulted with Whitaker to resolve them. According to McCoy, the conversation turned to Dick Smythe, with Whitaker asking McCoy if he knew why Smythe was at the site. McCoy said that he told Whitaker that he had an idea. According to McCoy, Whitaker said that Dick was there to send McCoy to Dayton.¹⁰ McCoy asked why would Dick want to send him there. According to McCoy, Whitaker said that Smythe wanted to send him to Dayton in the hope that such a move would prompt McCoy to quit. McCoy testified that he had never been assigned to Dayton by the Respondent and, in fact, had never been asked to work there. McCoy stated that he was shocked by the revelation that Dick Smythe would resort to this inasmuch as he had only seen and spoken to Smythe on one prior occasion in 1997.

McCoy stated that he reported to the Sisson Hall site on September 12 and observed Rick Smythe walking by the electrical closet several times, but saying nothing to him. According to McCoy, Rick seemed to be "eye balling" him, which made him feel nervous and intimidated. Acting on these concerns, McCoy stated that later that day, he called Robert Norris, a union organizer with whom he had met before joining the Union, and told him that he felt uneasy and intimidated on the job. McCoy stated that Norris advised him to assert his "*Weingarten*" rights if anyone from management approached him.¹¹ McCoy stated that nothing more was said to him about his assignment to Dayton and, in fact, he was never sent to Dayton by the Respondent.

Whitaker testified at the hearing. However, he did not address the allegation that the Respondent, through him, unlawfully threatened McCoy with more onerous working conditions; that is, requiring McCoy to travel farther to job assignments in order to induce McCoy's resignation.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7" The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American*

⁵ See R. Exh. 3, a copy of the handbook, effective as of June 11, 1998.

⁶ McCoy commuted about 100 miles each way to and from his job assignment in Columbus by his personal vehicle, a fact known by the Respondent's management, including Rick and Dick Smythe.

⁷ Whitaker is an admitted supervisor and/or agent of the Respondent.

⁸ Stafford is an admitted supervisor and/or agent of the Respondent.

⁹ There are other aspects of this conversation that relate to the 8(a)(3) allegations, which will be discussed in a separate section of this decision.

¹⁰ Notably, Dick Smythe testified that between September 11 and 20, he said nothing to McCoy about his working in Dayton. He, however, admitted that the Company had on occasion sent Columbus personnel to Dayton. He admitted also that he had talked to Whitaker about sending McCoy to Dayton but that it was only a possibility, and never acted on by him. (Tr. 242.)

¹¹ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), gives employees the right to union representation at an employee's investigatory interview at which the employee reasonably believes might result in disciplinary action.

Freightways Co., 124 NLRB 146, 147 (1959). Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 116 (1984), enf'd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466 (2000).

The Board has held that an employer may violate the Act by threatening employees with stricter or more onerous working conditions if they support a union or engage in protected activities. *Mathis Electric Co.*, 316 NLRB 258, 264 (1994); *United Artist Theatre*, 277 NLRB 115, 129 (1985).

Discussion and Conclusions of the 8(a)(1) Allegations

The threshold question is whether McCoy's supervisor, Whitaker, made or at least communicated the allegedly threatening comments of Dick Smythe to McCoy. I believe that he did. McCoy impressed me as a very candid, forthcoming, and respectful witness; he seemed to be of an honest and sincere nature. In my view, his testimony and demeanor on the stand clearly reflected his honesty and, by the way, excellent recall. Moreover, McCoy's version is on the one hand unrebutted—Whitaker offered no contrary testimony—and, on the other it is corroborated. In this latter regard, the General Counsel adduced certain tape recorded conversations between McCoy and Whitaker.¹²

The following excerpts (by the numbered paragraphs) in the transcript from McCoy's September 20 taped conversations with Whitaker (GC Exh. 9) are illustrative.

414 TIM [McCoy]: . . . and then Dick [Smythe] comes out and he tells me I can work as long as I can or as long as I want. You know, and I thought well, that ain't what Rick [Smythe] told me yesterday. You know, and then you come and told me that he wanted to send me to Dayton so that I would quit. Hell, I mighta went out there and got me a motel room. You know, maybe I would've went to Dayton.

415 SCOTT [Whitaker]: Oh yes, f—k you.

....

421 TIM: Well, I don't understand why he would say, you know, I'll just send his ass to Dayton, that way he'll quit. I mean, you know.

¹² McCoy testified that on September 19, he obtained a mini tape recorder from Norris and secretly recorded conversations with Whitaker at the Sisson Hall jobsite on September 20 and 21, 2001.

422 SCOTT: Well, that was Dick's, that's Dick's initial response to anybody that, when he finds out somebody's in the IBEW, that's his initial response.

423 TIM: That's what he always says?

424 SCOTT: That what he always does.

425 TIM: He always says, well I'll just send him to Dayton?

426 SCOTT: I'll just send him to Dayton, right.

427 TIM: You know that's not right.

428 SCOTT: That's when I told him, well he's [McCoy] not, I told him, you know he's [McCoy] talked to me, he [McCoy] says he doesn't, he's going out peacefully, doesn't want to come here and organize, make, raise and cause trouble.¹³

I would find and conclude that, clearly and unequivocally, Whitaker communicated the Respondent's threat to transfer or assign McCoy to the Respondent's Dayton operations to induce him to quit.¹⁴

I would further find and conclude that under the circumstances, including McCoy's prior announcement that he joined the Union, his never having been assigned to Dayton, the Respondent's knowledge that he commuted at least 100 miles each way to Columbus, and that a Dayton assignment would entail an additional 60 miles each way to his commute, that Whitaker's communication of Dick Smythe's threat to transfer McCoy to Dayton was coercive and reasonably tended to interfere with his Section 7 rights in violation of Section 8(a)(1) of the Act.¹⁵

C. The 8(a)(3) Discharge Allegation

McCoy testified that when he returned to work from vacation on September 10, he reported to Whitaker and asked for the day off because he had to deal with certain personal matters. According to McCoy, he also told Whitaker that he had joined the Union and one of the matters he wanted to attend to was to call the front office and tell management of his decision. McCoy stated that he did not want the front office to hear of his decision from some other source; he wanted to be honest with them. McCoy said that he told Whitaker that he would be leaving soon, but that he would not (as he described it) "lay down," he would continue to work as he had in the past. McCoy said he did not plan to work that day and did not.

¹³ The taped conversation also refers in pars. 439, 440, 443, and 444 to McCoy's being sent to Dayton to induce him to quit.

¹⁴ In making this finding, I specifically would find incredible Whitaker's testimony that he was merely giving "lip service" to McCoy or trying to console him and get the whole thing over with in this conversation. The actual tape recordings (see GC Exhs. 13 and 14) of this conversation were played in court, and Whitaker seemed sincerely supportive of McCoy and forthrightly related his position about the entire matter.

¹⁵ The Respondent argues that the threat to transfer McCoy to Dayton was a mere rumor, and never acted on by the Respondent. I reject this argument. Clearly, according to Whitaker, transferring or threatening to transfer IBEW workers to Dayton was part of the Respondent's standard response to unionists. That McCoy was not actually transferred is of no consequence.

McCoy stated that he called the Sisson Hall project manager, Donald Stafford, at around 1 to 1:30 p.m. (on September 10) and told him that he had joined the (IBEW) Union and that he would be leaving soon.¹⁶ According to McCoy, Stafford asked him to call the office later and speak to Rick Smythe who was unavailable at that time.

McCoy said he tried to call Rick Smythe a couple of times and finally reached him at around 5 p.m. According to McCoy, before he could tell him about joining the Union, Rick said to him, I hear you joined the Union, to which McCoy said he responded yes. McCoy said that he told Rick that he would be leaving soon. According to McCoy, Rick said, “[S]o now you are going to start paying to go to work.” McCoy stated that he took this to be a reference to union dues and reminded Rick that he was paying \$6.50 per day to park while working at the Sisson Hall project.

According to McCoy, Rick then said that he could work until the end of the week (September 14), then he had to go. McCoy stated that he was at a loss for words because he had no reporting date for a union job¹⁷ and did not give Rick a definite date for leaving. McCoy said the conversation ended on this note.

McCoy said he reported for work at Sisson Hall the next day (September 11) and before lunch saw Dick Smythe in the electrical room conversing with Whitaker; both men walked over to him. According to McCoy, Dick asked him if he had joined the Union, to which McCoy said he had. Dick then asked him whom he was going to work for; McCoy said he did not know. Dick then asked him when he was planning to leave, and McCoy said he did not know. At this point, according to McCoy, Dick shook his hand, thanked him for the job he had done for Buckeye and said that he (McCoy) could work for the Company for as long as he wanted. According to McCoy, Whitaker was present during this conversation the entire time but said nothing.

McCoy stated he thanked Dick and chose not to mention Rick’s comments and instructions of the day before because he felt that Dick (being company president and Rick’s father) called the shots. McCoy stated in fact he was relieved because he was concerned about having a job and keeping his (medical) insurance coverage.

McCoy said that on September 12, he went to the union hall and met with Norris. Once there, McCoy signed a nonunion salting form.¹⁸

¹⁶ McCoy said that both Whitaker and Stafford positively received his announcement and told him he was a good worker; Stafford said he hated to lose him and wished him luck.

¹⁷ McCoy said that when he joined the Union (by signing the authorization card) on September 7, 2001, he also signed the Union’s out-of-work book. However, he was informed by the Union’s business agent, Bill Hamilton, that at the time the Union did not have any work. Hamilton testified at the hearing and confirmed that at the time McCoy signed on, he explained the Union’s referral system, that McCoy was number 27 on the out-of-work list and that he should not expect automatically to have a job simply because he was now a member of the Union.

¹⁸ GC Exh. 4. This form informs the reader that McCoy was a member of the Union and has agreed to participate in the Union’s salting

Norris also gave McCoy “Buy American”¹⁹ and IBEW stickers and a copy of a “Guide to Union Membership Benefits booklet.” McCoy stated that Norris instructed him to give anyone interested in joining the Union the booklet, but only during nonworking hours. According to McCoy, Norris said he would fax the nonsalting form to the Respondent.²⁰

McCoy reported to work on September 13 and he placed the union sticker on his hardhat; he put the “Buy American” sticker on his hardhat either on September 13 or the next day. According to McCoy, after work on September 13, he placed his hardhat on a shelf in the work trailer which served as Whitaker’s office.

McCoy also stated that on September 20, at around the lunchbreak (11:30 or 12 noon), he spoke to his fellow workers about the Union and mentioned that if anyone were interested in union membership, its benefits and rights, they were free to read the guide booklet which he left on the picnic table in the lunch area at the site.

McCoy stated that at about 1 p.m. on September 20, Whitaker told him he was to call the main office and speak to Rick at 2:30 p.m. Unsure of what was in store for him, McCoy stated that he decided to call Norris who advised him to tape any conversation with management.²¹

As requested, McCoy called Rick at around 2:30 p.m. from the Sisson Hall site and taped the ensuing conversation.²²

TIM: Yea, this is Tim McCoy. I was supposed to call him at 2:30.

B.E.: Okay, hold on, cause he’s on long distance, hold on.

[Pause]

RICK: Hello.

TIM: Rick?

program by working for the Respondent to assist the Union in organizing effort. Both McCoy and Norris signed this form.

¹⁹ The “Buy American” sticker is contained in GC Exh. 5; and the IBEW sticker is contained in GC Exh. 6; the booklet is contained in GC Exh. 7.

²⁰ Norris testified that he explained the salting form to McCoy, saying it essentially allowed him to be a volunteer organizer and would protect him under the Act. Norris said he told McCoy that he would be faxing the form to different people, including Buckeye, informing them of his organizer status. However, Norris did not fax this form. Rather, Norris faxed to the Respondent a copy of a letter he sent to the Regional Director for Region 8. This letter (GC Exh. 16), inter alia, informs that the Union had commenced an organizing campaign at the Respondent and that McCoy was a volunteer organizer. Norris produced a fax transmittal sheet indicating that the Respondent received this letter on September 17 at 12:07 p.m. (GC Exh. 17).

²¹ McCoy stated that on September 19, 2001, he met with Norris at the hall and was given a mini tape recorder. Norris instructed him to tape any conversations he may have with management.

Norris testified that he provided McCoy with the recorder and instructions to record anytime McCoy thought he was being improperly disciplined or anything about his affiliation with the Union. According to Norris, because McCoy was confused about the call to Rick, he instructed him to record the conversation.

²² See GC Exh. 8, the transcript of this conversation. [As previously noted, GC Exhs. 13 and 14 contain the original tapes played in open court.]

RICK: Yea.

TIM: This is Tim.

RICK: Hey Tim, what's going on?

TIM: Not much. Scott told me I needed to call you at 2:30 p.m.

RICK: Oh, okay. Uh, I guess tomorrow is your last day then, right?

TIM: Not that I was aware of.

RICK: Well, you put your two weeks' notice in, so, um, you need to turn your keys and stuff into Scott tomorrow and—uh, I appreciate all your help and it's been nice working with you.

TIM: I never turned in a two-week notice.

RICK: Yes, you did.

TIM: How's that?

RICK: You turned one in to Don and you turned one in to my Dad.

TIM: Nope, no I didn't.

RICK: Well, I mean, you turned it in and uh—

TIM: No, I called on Monday.

RICK: As of, uh, this—this Friday, I mean, that the two weeks, so uh—

TIM: On a Monday, I called, er, talked to you and told you that, uh, I had joined the Union and I would be leaving Buckeye Electric soon. So that there would be no secrets, but I never turned in a 2-week notice, cause I didn't know for sure when I was leaving and uh, until, you know, how can I turn in a 2-week notice if I don't know?

RICK: You turned it in and we are acting on your notice, uh—

TIM: I never gave a notice.

RICK: Huh?

TIM: I never gave a notice

RICK: You gave a notice, Tim. Um, as of Friday, um, you know.

....

RICK: Friday is your last day and uh, um, we're taking up your two-week notice and uh—

TIM: I never gave a two-week notice, but uh—

RICK: —and uh, you know, it's been a pleasure working with you and wish you luck.

TIM: I think the luck's with me.

RICK: All right.

TIM: You know it,—

RICK: —and uh

TIM: I don't—I never turned in a two-week notice, and uh—

RICK: Well—

TIM: If Don says I did, then I, well uh, uh, that's, uh, that's a flat lie, I never said that, I, all I said—

RICK: My Dad said you turned one in and so did Don and uh, uh, basically, you know, that's what we were taking, uh, your notice and uh, and uh, we'll go from there.

TIM: Okay, buddy.

RICK: Okay.

TIM: Thank you, Rick.

McCoy reported to work on September 21 but stated that he did not actually intend to work because he was a nervous wreck—he was unemployed and had not made arrangements for family medical insurance. McCoy stated that after the conversation with Rick, he planned only to come in, turn in his keys, retrieve his personal tools, and essentially muster out. McCoy said he did, however, speak with Whitaker and took that opportunity to tape this conversation.²³

McCoy stated that he went home and attempted to reach Stafford but was unsuccessful.²⁴

However, on one of his subsequent attempts to speak with Stafford, McCoy said he spoke to Dick Smythe and he taped this conversation.²⁵

DICK: Hello.

TIM: Don?

DICK: No, this is Dick Smythe.

TIM: Dick?

DICK: Yea.

TIM: This is Tim McCoy.

DICK: Yea, what can I do for you, Tim?

TIM: Uh, I was talking to Rick there yesterday. He said that uh, you and Don said I turned in a two-week notice

DICK: You told me on, on Tuesday of last week, that you went to work for the Union and you were going to leave on Friday and I told you, you could stay until next Friday.

TIM: No.

DICK: You said that would be fine.

TIM: No, I said, you know, I said I had joined the Union and you—

DICK: No, that is not what you said.

TIM: Uh—

DICK: You also picked up your tools today and packed up, and turned in all your stuff.

TIM: Well, that's because Rick told me yesterday that I had to.

DICK: No, no, he didn't tell you that, he told you that you could finish out the day.

TIM: He told me—

DICK: And you didn't do that.

TIM: He told me yesterday that I was to turn in my tools because today was going to be my last day. And that we—

DICK: That's correct.

TIM: That was the first time I had heard of that.

DICK: You told me. I've got, I've got it all written down, uh, you not only told him, you told Don, you told everybody that you were, you went to work for the Union,

²³ The transcript of this September 21 conversation is contained in GC Exh. 10. Again, note that the original tape recording of this conversation was played in open court and is contained in GC Exhs. 13 and 14.

²⁴ McCoy taped his unsuccessful attempt to contact Stafford. The transcript of this call is contained in GC Exh. 11.

²⁵ The transcript of this taped conversation, also played in open court, is contained in GC Exh. 12.

were going to work, were going to have a place to park your car.

TIM: No.

DICK: I, I, I'm more than happy for you.

TIM: And I appreciate that but I, I, I didn't quit and I didn't turn in a two-week notice.

DICK: Well.

TIM: I said that I had joined the Union and that I would be—

DICK: That's not what you told me. That is not what you told me.

TIM: Sir, I said that I had joined—

DICK: Hey, I'm not gonna argue with you.

TIM: Right.

DICK: You know, uh.

TIM: I'm not trying to—

DICK: Well, you went to work for the Union and you told me, you told me you were turning in your notice, and that's exactly what we talked about. This was on the 11th.

TIM: I said that—

DICK: That was the day that I was up there.

TIM: I said—

DICK: I, I, I marked it down, I have it written down. You not only told me. You told everybody else.

TIM: No, I told you that I had joined the Union and I would be leaving Buckeye soon and you ask me who I was gonna go work for.

DICK: I didn't ask you anything.

TIM: And you said—

DICK: I don't care who you are going to work for.

TIM: And then you ask me when I was leaving.

DICK: No, you told me that you weren't, you would like to stay another week and I said fine, next Friday can be your last day.

TIM: No, you ask me—

DICK: That's exactly what I told you

TIM: No, you ask me when I was leaving and I said I didn't know, because at the time I didn't. Yes, I had joined the Union but I didn't know when they were gonna call me.

DICK: I'll tell you what Tim, I know that you told me and all I can say is you talk to your Union and you do whatever you have to do. I know that you quit.

TIM: No.

DICK: I have witnesses that you quit, you picked up your tools and walked off the job this morning, didn't finish out the day. As far as I am concerned, you no longer work for Buckeye.

TIM: Well, I was, I was under a lot of stress because as of yesterday was the first that I knew today was my last day.

DICK: No, no, no. It's not the first you knew. It's when you turned in your notice.

TIM: Well, I wanted—

DICK: Evidently, evidently, the A team that called you up, doesn't want you.

TIM: No, that's not true.

DICK: Evidently, because what you're saying is you wanta stay and work for Buckeye.

TIM: I wanted to stay and work until they, until I got another job, yes.

DICK: Well, hey, you know, you told me, you turned in your notice.

TIM: I just—

DICK: And as far as I am concerned, you no longer work for Buckeye.

TIM: I never turned in a notice, I just said—

DICK: Yes you did, yes you did, you told me you would only work till Friday and I said you could work to the next Friday if you want to and you said okay, I'll work, I'll work till next Friday.

TIM: No, I, I—

DICK: You didn't even work the next Friday, you took off.

TIM: Well, I had that bombshell dropped on me yesterday.

DICK: Oh—

TIM: You know and I—

DICK: It's not a bombshell, it's something you, you know, you turned in your notice and now, now, it's a bombshell.

TIM: I just—

DICK: Tim, I, I really, I'm gonna end the conversation. I wish you the best of luck, good luck with the Union.

McCoy insisted that he never gave Stafford or the Smythes any 2-week notice of his intention to quit or that he would work only until Friday, September 21; nothing was mentioned between September 11 and 20 in any conversation with anyone in management about a final date. McCoy stated that he had no other job lined up with the Union prior to September 21 and could not have told Stafford or the Smythes that he had a job.²⁶

The Respondent called Don Stafford, Rick and Dick Smythe, and Scott Whitaker.

Don Stafford recalled that he had a discussion with McCoy about his leaving the Respondent's employment and that McCoy told him that he had found a new job. Stafford stated that as was his custom, he told McCoy at the time—after McCoy had returned from his vacation—that he could work until the end of the week. Stafford related that in late August (the 28th), McCoy told him that he was unhappy with having to pay for his own parking at the Sisson Hall site. Stafford said that he told McCoy that he could do nothing about the matter because if he paid for his (McCoy's) parking, he would have to

²⁶ The Genral Counsel called Bill Hamilton, the Union's business manager. Hamilton testified that he told McCoy at the time he joined the Union that the Union had no work for him at that time, that he did not have to quit his job at Buckeye. Hamilton said that McCoy was placed on the Union's out-of-work list which had 26 names on it at the time. Hamilton stated he was the sole union official who made referrals and McCoy was not scheduled for any short- or long-term jobs before September 21. Hamilton said that after McCoy was discharged, he requested a job. Hamilton said he placed McCoy on the Union's short call list—jobs lasting 14 days or less; and approximately a week later, Hamilton referred McCoy to a short-term job at a utility company.

pay for all of the other workers. Stafford stated that McCoy's announcement followed on the heels of this but that McCoy did not give him a time frame for his departure. Consequently, Stafford said he told McCoy he had until the end of the week which would have been September 14.

Stafford stated that he believed he discussed the matter with Rick Smythe, informing him that McCoy had found employment elsewhere. During the course of the week of McCoy's disclosure, he came to understand that McCoy was being allowed to work through the following week, September 17–21, by Rick or Dick Smythe.

Stafford admitted that he had nothing to do with the extension and, in his view, he took McCoy's initial announcement as his only notice of resignation. Stafford could not recall whether McCoy told him he had joined the Union.²⁷ However, he recalled that Whitaker later told him that McCoy had joined the Union and, in fact, he had a union sticker on his hardhat.

Rick Smythe testified that on September 10, McCoy told him that he had found another job and would be leaving soon, which he interpreted to mean that McCoy was resigning. Consequently, he gave McCoy the balance of the week—until September 14—to get any loose ends tied. Rick admitted that McCoy also told him at the time that he had joined the Union. However, according to Rick, he made the decision to give him until the end of the week because it was his rule of thumb to give resigning employees an option to work out the week, or perhaps longer in some cases. Rick said that McCoy, in the end, was given an additional week ending September 21 by his father, Dick.²⁸ Rick denied that McCoy's union membership or activities was in any way involved in his decision. Rick stated that the sole motivation for him was McCoy's having found another job and, since McCoy was an at-will employee, management was free to set a day for his departure.

According to Rick, he was not aware of any union activity at the Sisson Hall site, and he had not before the hearing seen the non-salting form signed by McCoy, the union stickers, or the union benefits guide.²⁹

Rick stated that his call to McCoy on September 20, was merely a reminder to him, that his last day was Friday, September 21, and that he should turn in his keys—a standard procedure of the Company. Rick insisted that McCoy never said, "I will be leaving soon," because he would not have considered this to be indicative of a resignation.³⁰

²⁷ Stafford acknowledged, however, that in a February 2002 affidavit, he averred that McCoy did say to him that he had joined the Union. (Tr. 175.) Stafford was not sure his affidavit was true.

²⁸ Rick stated that some time between September 11 and 20, he spoke with his father regarding McCoy's employment and his father said that McCoy had given him a 2-week notice on September 11. Consequently, McCoy was given an additional week.

²⁹ Rick admitted, however, that "it [was] safe to assume" that he saw at some point a letter from the Union to the Regional Director indicating the union organizing campaign and McCoy's volunteer organizer status. This letter will be discussed later in the decision.

³⁰ Confronted with a document he signed on September 21, 2001, Rick admitted that he did not mention therein that McCoy said he found another job but that he had joined the Union.

Rick acknowledged that on September 20, McCoy obviously did not believe that he had given 2 weeks' notice of his intention to quit. Rick said that he took the view that McCoy had simply changed his mind, but that he chose not to reconsider his decision to let him go as originally planned.

Whitaker testified that he conversed with McCoy on September 10 and that McCoy stated he was not going to work that day because he had some personal matters to attend to. According to Whitaker, McCoy told him that while on vacation, he had taken a test for admittance to the Union and had been sworn in on the previous Thursday or Friday; McCoy said that he was going to sign the out-of-work book of a couple of locals, one near his residence, and one in Columbus.³¹ Whitaker said that McCoy also said that he was going to call Rick and give him his 2 weeks' notice; he wanted to tell Rick personally.

Whitaker stated that McCoy reported to work the next day—September 11—and informed him that Rick had given him until the end of the week to work. Later that day (about 10 or 11 a.m.), Dick Smythe appeared at the Sisson Hall job and asked to speak with McCoy. Whitaker took Dick over to where McCoy was working near the electrical closet and participated in the conversation for (as he described) the first couple of sentences. Whitaker heard Dick's opening comment, "So you joined the Union and McCoy's response of "yes"; Dick also asked McCoy where he was going to work. Then, according to Whitaker, a worker needed his help and he no longer paid attention to the conversation. Once the worker was assisted, Whitaker said that he rejoined the conversation only to hear Dick wish McCoy good luck and shake his hand. Whitaker said he did not hear Dick or McCoy mention anything about a 2-week notice.³² Whitaker said that after September 11, there were no discussions between himself and Dick about McCoy's last day of work.

Dick Smythe testified that on September 11, he visited the Sisson Hall project because it was his turn to monitor the job. Dick said that while at the site, he met with McCoy around 11 a.m. in the area of the electrical closet; Whitaker and two other journeymen electricians³³ were present. Dick stated that he had been told by Rick that McCoy was quitting and would be finishing up and leaving at the end of the week. Dick said that he just happened to walk through McCoy's work area and stopped to talk to McCoy. Dick said that he did not want necessarily to talk with him but wanted to wish McCoy luck.

³¹ McCoy, on rebuttal, testified that on September 10, he never mentioned Rick's name or anything about contacting Rick personally. He stood by his testimony that he only told Whitaker that he wanted to call the main office and talk to someone about his decision to join the Union. He also again denied saying to Whitaker or anyone in management that he was going to give Rick a 2-week notice. McCoy also denied saying anything to Whitaker about signing union out-of-work books on September 10.

³² Whitaker was insistent that he, himself, was never given a 2-week notice of intention to resign or quit by McCoy.

³³ Dick identified one of the electricians as Tom and another whose name he could not remember. Whitaker, it should be noted, identified the two as Tom Hughes and Mike Clofta. Dick stated the two men are still employed by the Respondent. Neither man testified at the hearing.

Dick testified that McCoy told him that he had joined the Union and was going to work there. McCoy also said that Rick had told him he could finish out the week. Dick stated that he told McCoy that this would be acceptable and also that if he (McCoy) wanted to stay another week, that would be all right also. Dick testified that he could not explain his granting McCoy another week, but that McCoy had said to him that things (job prospects) were not going to break for another week and that he was going to work with a former Buckeye Electric employee, Jim Biggler.³⁴ According to Dick, the conversation ended amicably with his shaking McCoy's hand and wishing him luck. Dick denied telling McCoy he could stay as long as he desired.

Dick acknowledged his September 21 conversation with McCoy and stated that (at the time) he was not unhappy with McCoy's decision to quit; that McCoy stated he had another job with the Union. As far as he was concerned,³⁵ McCoy had simply changed his mind but he (Dick) no longer wanted him as an employee.

Dick testified that he was not aware of any union activity at the Sisson Hall site or any Buckeye Electric jobsite.³⁶ Dick conceded that he did not know precisely when his Company received the letter from the Union informing of McCoy's volunteer status and the Union's organizing campaign at Buckeye Electric, but, based on the fax transmittal sheet, he must have seen it on September 17. However, Dick denied seeing any union literature at the Sisson Hall job and was not aware that McCoy had left union literature on the jobsite.

Applicable Legal Principles

In cases where employers are charged with violations of Section 8(a)(3)³⁷ and (1)³⁸ of the Act, the Board set forth its test of causation in the case of *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under this test, for determining, as here, whether an employer's layoff or discharge of an employee was motivated by hostility toward union membership or union activity, the General Counsel has the burden of persuasion, that protected

conduct was a substantial or motivating factor in the employer's decision.

A prima facie case is made out where the General Counsel establishes union or protected activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

If this initial burden is met, then the burden of persuasion shifts to the employer to prove its affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity.³⁹ If the reasons advanced by the employer for its action are deemed pretextual, that is, if the reasons either did not exist or were not in fact relied upon, it follows that the employer has not met its burden and the inquiry logically ends. Where an employer asserts a specific reason for its action, then its defense is that of an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct. Thus, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place. *Kellwood Co.*, 299 NLRB 1026, 1028 (1990).

Notably, the Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. [Fn. omitted.] *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

It is well settled under Board precedent that the timing between the employer's action and known union activity can supply reliable and competent inherent evidence of unlawful motive for purposes of the *Wright Line* analysis. *Grand Rapids Press*, 325 NLRB 41 (1998); *Kinder Care Learning Centers*, 299 NLRB 117 (1990); *Alson Knitting, Inc.*, 301 NLRB 758 (1991). Also, where an employer accelerates a discharge or layoff of an employee in close proximity to union activity, this, too, may supply evidence of unlawful motive. *IMAC Supply*, 305 NLRB 728, 736-737 (1992); *American Wire Products*, 313 NLRB 989 (1994).

It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances proved. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

D. The Threshold Issue

As a threshold matter, I must determine what McCoy told management first on September 10 and later on September 11 regarding his employment at the Company. There is no serious dispute that on both occasions he told the Respondent's principals, the Smythes, and agents that he had indeed joined the Union on September 10 and 11. Whether he told them that he

³⁴ McCoy, on rebuttal, adamantly denied ever mentioning Biggler to Dick Smythe in this conversation as well as never telling Dick that he needed another week because jobs were not going to break for another week.

³⁵ Dick also acknowledged that in an affidavit provided to the Board agent investigating this matter, he said he had had no further conversations with McCoy after September 11. Dick stated he had forgotten about the September 21 conversation with McCoy.

³⁶ Dick specifically denied ever seeing before the hearing the "Buy American" sticker and the union booklet, and certainly not at the Sisson Hall site. Dick had seen the IBEW sticker—he was a former union contractor—but not at Sisson Hall. Dick also conceded that he was aware that McCoy wore the IBEW sticker while employed at the Company, but he had no problem with his wearing the sticker.

³⁷ Sec. 8(a)(3) of the Act (29 U.S.C. §158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

³⁸ Sec. 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the Act."

³⁹ The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966).

had another job and would be leaving soon is, in my view, crucial to the resolution of the underlying charge of unlawful discharge. Thus, credibility looms large in my determination of the charge. A few words on credibility. It became clear to me early on in that this litigation would largely turn on the testimony of the witnesses. Accordingly, I paid very careful attention to the demeanor aspect of their testimony at trial. As is obvious, I have also been meticulous in recounting the material testimony of each person in this matter.

Thus, as to the threshold issue, I would conclude that on September 10 and 11, McCoy informed management that he had joined the Union and would be leaving soon. I would further conclude that he did not tell management at any time, but specifically on those dates, that he had another job, was working for the Union, would be working with another former employer, or had given the Respondent 2 weeks' notice of his intention to quit.⁴⁰ My reasons are as follows:

As I have previously stated herein, I found McCoy to be a remarkably honest person. From the beginning, as he consistently testified, he wanted to be honest with his employer regarding his joining the Union and desiring to leave at some point. However, it is clear on this record that he did not have another job lined up with the Union, so he could not have said that he had a job.⁴¹

Also, McCoy convinced me that given his particular circumstances, including his supporting a family and having need for medical insurance as well as his demonstrated and recognized work ethic, that he would not resign his employment with Respondent with no job prospects. Also, given his tape recorded conversations with Whitaker and the Smythes, he clearly disputed having given the Respondent any notice that he was quitting on September 10 or 11 to take another job. I further believe that he was told by Dick Smythe that he could stay with the Company for as long as he desired. Contrary to Dick Smythe's assertion, I believe there was ample reason for Smythe to offer McCoy this option—McCoy was a proven good and reliable electrician and was willing to commute 200 miles per day to work for the Respondent.⁴² Notably, over his time with the Respondent, McCoy never required discipline. Moreover, it is clear from the tape recorded conversations that McCoy was liked by his supervisors and other colleagues and was very respectful to his superiors, even in the face of a serious disagreement with them about his employment.

The Respondent's witnesses presented a fairly unified front, maintaining essentially that McCoy had told each man that he had found another job (or) was giving notice (2 weeks), and

would be leaving the Respondent's employ soon. However, I found the testimony of each of the Respondent's witnesses unpersuasive on this point. In the case of Whitaker, his taped-recorded conversation with McCoy, in my view, undermined his court testimony which seemed evasive and noncommittal and yet overly protective of management. Stafford's testimony was contradictory, hesitant, and actually confusing. Rick Smythe, in my view, exhibited hostility to McCoy's initial announcement of joining the Union but claimed in a self-serving way that McCoy's termination was handled the same way he handled resignations of other employees; he offered no proof on this point save his testimony.

According to Rick, however, there was no specific company policy dealing with the situation of an employee who informs him that he has found another job. He employed his own rule of thumb in such situations. Rick also said that the Company experiences a "pretty low turnover rate," leaving one to guess when he ever applied his rule of thumb to allow employees to work out the rest of the week in which they announce a resignation. This seemed contrived to me.

Dick Smythe stated not only did McCoy tell him that he had joined the Union but was going to work for it. This, to me, was far off the mark and simply incredible. I note that Dick Smythe in the end converted his testimony that McCoy gave him his 2 weeks' notice to the Company to Dick's actually having given McCoy 2 weeks to quit. Again, Smythe's testimony simply did not ring true.⁴³

Having found that McCoy did not tell anyone in management that he had found another job, I turn to the issue of McCoy's discharge on September 12 and specifically whether his termination was unlawful under the Act.

Conclusions

I would find and conclude that the General Counsel has made out a prima facie case per *Wright Line*. First, it is undisputed that McCoy announced his having joined the Union to not only his immediate supervisor but ultimately to the Company's president and vice president. Second, McCoy credibly testified that while at least at first he did not intend to engage in organizing activities, he later did engage in activities supportive of the Union's organizing objectives. The record supports a finding that the Respondent was aware of his activities. It should be noted that Stafford testified that he found out from Whitaker that McCoy had a union sticker on his hardhat. Whitaker stated (in the taped conversation of September 20) that Stafford on about Tuesday, September 18, saw McCoy's hardhat with the sticker affixed and got the "red ass" (irritated) over the display and said it was unfair for McCoy to advertise for another company while still working for Buckeye. Whitaker, himself, confessed to being irritated over McCoy's wearing the sticker on his hardhat. Dick Smythe also reluctantly admitted he was aware of McCoy's wearing the sticker but said he had no problem with this.

⁴⁰ I note on this latter score, Dick Smythe conceded at my questioning at the hearing that actually McCoy did not give 2 weeks' notice. Rather, Smythe said he gave McCoy 2 weeks to quit and called it 2 weeks' notice because he gave him 2 weeks to leave. (Tr. 245.)

⁴¹ In this regard, I have credited Hamilton who, among other things, testified at length about the Union's referral system and, more importantly, that McCoy was never scheduled for a union job prior to his discharge.

⁴² See GC Exh. 2, McCoy's employee evaluations which indicate that he was highly evaluated by his foreman during calendar years 2000 and 2001. Also, McCoy received an employee of the month award on December 13, 1997. (See GC Exh. 15.)

⁴³ I might add that Dick Smythe's credibility was seriously damaged by his having "forgotten" his last conversation with McCoy on September 21 (the taped one). I agree with the General Counsel that that was a very memorable event and this lapse of memory seems inexplicable.

McCoy stated that in addition to wearing the union sticker, he also talked to his fellow employees about the Union; he also left the union booklet at the jobsite on September 20, a few hours before he received the "reminder call" from Rick Smythe.⁴⁴ However, irrespective of this evidence, which, in my view, in itself satisfies the knowledge element, there is the letter faxed by the Union to the Respondent on September 17, a Monday, admittedly received by both Smythes, which removes all doubt regarding this issue. It can hardly be gainsaid that Respondent did not know of McCoy's activities in support of the Union before he was discharged.

Regarding the issue of animus, it seems clear that the record well establishes the Respondent's hostility to unions and union supporters. First, there is Rick Smythe's somewhat snide remark to McCoy that he now was going to pay to go to work, an obvious reference in my mind to the union dues requirement. Second, there is Whitaker's testimony that the Respondent almost reflexively sends or threatens to send Columbus-based union workers to Dayton to induce them to quit. Third, there is Dick Smythe's acerbic statement to McCoy in the September 21 tape that "evidently the A team that called you up, doesn't want you," which in my view practically exudes animus. Finally there is the aforementioned September 17 letter from the Union that identified McCoy as a volunteer organizer for the Union's organizing campaign at Buckeye Electric. Needless to say, a scant 3 days later, coupled with McCoy's distributing the union booklet, McCoy gets the reminder call that his last day would be the next day. Thus, with the Respondent's expressed hostility, as well as the suspicious timing between the Union's notice and McCoy's on-the-job activities in support of the Union, I would find and conclude that the animus element of *Wright Line* is amply established by the General Counsel.

The Respondent's principal defense is that McCoy announced his intentions to leave the Company on September 10 and again on the September 11; that McCoy was an at-will employee and, therefore, the Respondent was free to terminate him. I agree that as an at-will employee, McCoy could either quit or be terminated by the Respondent for no reason and without notice. In my view, the Respondent could have lawfully terminated McCoy on September 10 when he announced that he had joined the Union and would be leaving soon. In fact, Rick Smythe's initial decision to give McCoy until the end of the week, September 14, probably posed no violation under the Act. However, Dick Smythe intervened and, as I have found, told McCoy he could stay employed with the Company for as long as he desired. The elder Smythe probably granted this concession because Whitaker told him that McCoy would not organize, "make noise and trouble," and McCoy was regarded as a good and reliable electrician and mechanic. Still, the Respondent could awfully have terminated McCoy based on his at-will status. However, it is clear that the Respondent cannot terminate employees because of their union activities. I believe that it was principally the Union's letter, combined with

McCoy's own organizing efforts which started with his initially wearing a union sticker and ended with his talking to the workers and distributing literature, that caused the Respondent to accelerate his departure from the Company. I would so find and conclude. I also find and conclude that the Respondent's proffered justification for discharging McCoy, his purported resignation, and giving 2 weeks' notice of his intention to quit was a pretext, manufactured by the Respondent to cover its termination of him because of his engaging in union organizing activities.

CONCLUSIONS OF LAW

1. Buckeye Electric Co., the Respondent herein, is an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By its supervisor's threatening employees with more onerous working conditions because of their support of the Union, the Respondent violated Section 8(a)(1) of the Act.
4. By discharging employee Tim McCoy because of his union activities, support, and sympathies, and to discourage employees from engaging in these and other protected activities, the Respondent violated Section 8(a)(3) and (1) of the Act.
5. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. The Respondent has not violated the Act in any other way, manner, or respect.

REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Tim McCoy, I shall recommend that it be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁵

ORDER

The Respondent, Buckeye Electric Co., Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employees for engaging in activities supportive of the Union, seeking both membership in the Union and the benefits of

⁴⁴ I will note at this juncture that I find it highly suspicious that McCoy would receive this call from Rick Smythe on the very afternoon he leaves the union booklet on the lunch table and is talking to other employees about union benefits.

⁴⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

membership in the Union, and engaging in concerted activities, and discouraging employees from engaging in these activities.

(b) Threatening employees with more onerous working conditions because of their support of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Offer Tim McCoy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, plus interest.

(b) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Tim McCoy and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form,

necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Dayton and Columbus, Ohio, copies of the attached notice marked "Appendix."⁴⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁴⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."